IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELLIS MARSHALL,	:	**CIVIL ACTION**
Petitioner,	:	
v.	:	**NO. 02-CV-510**
IMMIGRATION & NATURALIZATION SERVICE, et al.,	:	
Respondents.	:	

Reed, J. **April 29, 2002**

M E M O R A N D U M

Pending before the Court is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C.§ 2241 by petitioner Marshall Ellis, who is currently incarcerated at Berks County Prison in Leesport, Pennsylvania. Petitioner alleges that his detention and impending deportation by the Immigration and Naturalization Services ("INS") violates his due process rights under the Fifth Amendment of the U.S. Constitution. In addition to the writ of habeas corpus, petitioner also seeks a stay of deportation, and the return of $20,000 allegedly confiscated from him by the INS. For the reasons set forth below, the petition and motion of plaintiff will be denied.

A. Factual Background

Petitioner Ellis Marshall is a native and citizen of Trinidad and Tobago. Marshall entered the United States in St. Thomas, Virgin Islands, on or about April 1, 1969 as a non-immigrant visitor for pleasure with authorization to remain for a temporary period not to exceed September 1, 1969. (Resp. Exh. 1.) Marshall remained in the United States beyond September 1, 1969 without authorization from the INS. On December 10, 1971, while Marshall was in prison in Warren, Ohio, the INS issued an Order to Show Cause and Notice of Hearing, ordering Marshall to appear for a hearing in Cleveland, Ohio on January 12, 1972. The Notice stated that Marshall was subject to deportation for remaining in the United States beyond the authorized time period. (Id.)

On January 18, 1974, an Immigration Judge ordered Marshall deported to Trinidad for the

reasons stated in the Order to Show Cause. (Resp. Exhs. 1 and 2.) Marshall was deported from the United States to Trinidad on January 30, 1974. (Doc. 1 at p. 3.) Marshall then returned to the United States on September 1, 1974, without obtaining the necessary consent for his readmission from the Attorney General. (Id.)

On July 18, 1975, Marshall received an approved immediate relative visa, filed on his behalf by his wife at that time, Sharon Murphy Marshall. (Nov. 27, 1981 Immigration Court Order, Resp. Exh. 7, at p. 2.) At one point, Ms. Marshall withdrew her sponsorship of petitioner's application based on an affair he was having; they later reconciled and she reinstated her support for his application. (Resp. Exh. 8 at ¶ 30.)

On July 22, 1975, the INS issued another Order to Show Cause and Notice of Hearing, stating that Marshall was subject to deportation because he had entered the country without permission of the Attorney General. (Resp. Exh. 3.) Marshall was ordered to appear at a hearing before an Immigration Judge of the INS on August 4, 1975. (Id.) On August 4, 1975, the Immigration Judge granted Marshall the option of a voluntary departure, to be completed by October 4, 1975. If Marshall failed to depart voluntarily by that date, the Immigration Judge ordered him deported to Trinidad. (Resp. Exh. 4.) Marshall did not leave the country voluntarily and on November 13, 1975, the Service issued a Warrant of Deportation for Marshall. (Resp. Exh. 5.) Marshall ignored the warrant to surrender for deportation. (Resp. Exh. 6 at p. 1.) On October 28, 1981, Marshall was apprehended by INS investigators. Marshall had in his possession one pound of marijuana and $20,000. (Resp. Exh. 6.)

On November 10, 1981, the District Director of the INS in Brooklyn, New York, denied Marshall's request for a stay of deportation proceedings. (Resp. Exh. 6.) However, on November 27, 1981, an Immigration Judge granted Marshall a stay of deportation and granted his motion to reopen deportation proceedings to allow Marshall to seek a suspension of deportation. (Nov. 27, 1981 Immigration Court Order, Resp. Exh. 7.) The Immigration Judge concluded in the Order that by re-entering the United States without the permission of the Attorney General,

Marshall had violated Subsection 212(a)(17) of the Immigration and Nationality Act ("INA"), formerly 8 U.S.C. § 1182(a)(17).[1] The Immigration Judge further concluded that Marshall's reentry into the United States following his February 23, 1973 drug conviction also violated Subsection 212(a)(23) of the INA, formerly 8 U.S.C. § 1182(a)(23), but that the subsequent vacating by the New York trial court of his conviction on December 10, 1976 cured this defect. Finally, the Immigration Judge noted Marshall's July 28, 1977 conviction in New York for harassment. (Id.) To obtain a suspension of deportation, Marshall needed to establish seven years of residence in the U.S., good moral character, and extreme hardship to family. (Id.)

Marshall's case was thus reopened and set for a hearing in or about July, 1982, but the case was adjourned because Marshall's file could not be located. There appears to have been no action taken by the INS on Marshall's case again until 2001. (Resp. Exh. 9 at p.2.) In the meantime, Marshall and Sharon Murphy Marshall divorced on April 7, 1992. (Id. at ¶ 48.) Marshall was convicted of petit larceny on May 31, 1990 in Brooklyn, New York, and criminal possession of marijuana and crack cocaine on December 16, 1994. (May 29, 1997 Presentence Report for Eastern District of New York, Resp. Exh. 8 at ¶¶ 33-34.) Additionally, on March 14, 1997, Marshall pleaded guilty to the charges of conspiring from 1993 to 1996 to import and to distribute cocaine and cocaine base, for which he was arrested on September 24, 1996, and was sentenced in or about July, 1997. (Id. at ¶¶ 1-18.) On December 12, 2000, Marshall was again convicted in federal court on drug trafficking charges. (Resp. Exh. 9 at p. 3.)

On or about December 21, 2000, Marshall was turned over to the custody of the INS. On February 22, 2001, an Immigration Judge in New York ordered Marshall's deportation to Trinidad. The Immigration Judge made the following finding: "[Marshall] had previously admitted that he was subject to deportation based on the original charge of returning to the

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[1] Section 1182(a) of Title 8 has since been amended, whereby the number of classes of inadmissible aliens was decreased from thirty-four to nine by broadening the descriptions of the classes. See Perez-Rodriguez v. Immigration and Naturalization Service, 3 F.3d 1074, 1075 n.1 (7th Cir. 1993) (citing Immigration Act of 1990, Pub. L. No. 101-649 § 601(a), 104 Stat. 5066-85). The present equivalent of former 8 U.S.C. § 1182(a)(17) is now 8 U.S.C. §1182(a)(6)(A).

United States after deportation without first obtaining the necessary permit to do so. That has never been disputed, and the Court finds that the respondent is still subject to deportation on that basis." (Feb. 22, 2001 Immigration Court Order (unsigned), with signed short order, Resp. Exh. 9 at p. 3.) The Immigration Judge further considered whether Marshall was eligible for any relief from deportation, and found that he was not eligible for any relief because of his drug trafficking conviction from December 12, 2000. (Id.)

Marshall appealed the Immigration Judge's February 22, 2001 Order of Deportation to the Board of Immigration Appeals ("BIA"). The BIA affirmed the Immigration Judge's decision in an Order dated December 14, 2001. (Resp. Exh. 10). In January, 2002, Marshall attempted to file a motion to reconsider the BIA's ruling. His motion was rejected by the BIA because he did not include the required fee. (Resp. Exh. 11).

On January 2, 2002, Marshall filed an Affidavit In Lieu Of Lost Receipt Of United States Immigration and Naturalization Service For Collateral Accepted As Security. (Resp. Exh. 12.) In this form, Marshall states that he has lost his receipt for $20,000 that he had in a bag when he was arrested by officers on October 28, 1981. (Id.) His explanation for the lost receipt is that he "was in jail for the pas[t] five years." (Id.)

On or about January 30, 2002, Marshall filed this petition for writ of habeas corpus in the Eastern District of Pennsylvania, as supplemented on March 5, 2002. In his petition, Marshall seeks relief from the Order of Deportation pending against him; he contests his detention by the INS during these deportation proceedings; and he seeks to recover the $20,000 that was allegedly taken by the INS when he was arrested on October 28, 1981.

B. Legal Standard

It is now clearly established that this Court retains subject matter jurisdiction to entertain petitions for a writ of habeas corpus filed by aliens subject to deportation pursuant to Section 2241 of Title 28. See 28 U.S.C. §2241; Zadvydas v. Davis, 533 U.S. 678, 688, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001); INS v. St. Cyr, 150 L. Ed. 2d 347, 121 S. Ct. 2271, 2287 (2001).

This is so despite the amendments to the INA rendered by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 110 Stat. 3009-546. Pursuant to its habeas jurisdiction, a court may review the legality of removal orders. See Chmakov v. Blackman, 266 F.3d 210, 215-16 (3d Cir. 2001). Nevertheless, federal courts may not review the factual or discretionary decisions of the Attorney General to execute removal orders. Id. at 215 (citing 8 U.S.C. §1252(g));[2] see also Sciglitano v. Ashcroft, Civ. No. 00-0083, 2002 U.S. Dist. LEXIS 4988, at **11-12 (E.D. Pa. March 25, 2002) (citing St. Cyr, 121 S. Ct. at 2278, 2283 (distinguishing between review of petitioner's eligibility for discretionary relief and favorable exercise of discretion by Attorney General)).

C. Analysis

1. Post-Removal Period Detention

In the instant petition, Marshall challenges his detention by the INS on the grounds that he has been held in detention for more than six months and that he therefore must be released pursuant to Zadvydas, 533 U.S. at 699-702. Zadvydas involved two different instances of detention. The first detainee was Kestusis Zadvydas, a resident alien born of Lithuanian parents in a displaced persons camp in Germany in 1948. Id. at 684. Upon serving several years of imprisonment for various crimes, Zadvydas was ordered deported to Germany, which refused to accept the individual as he was not a German citizen; similarly, Zadvydas was rejected by the Dominican Republic (his wife's home country), as well as by Lithuania for lack of documentation of his parents' citizenship. Id. The second detainee was Kim Ho Ma, a Cambodian national who was brought to the U.S. at the age of seven. Id. at 685. After serving two years of imprisonment for manslaughter, Ma was released into INS custody for removal to

[2] Section 1252(g) states, in relevant part:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Cambodia, despite the lack of any repatriation treaty between Cambodia and the United States that would have provided for Ma's return. Id.

To determine the constitutionality of the aliens' detention, the U.S. Supreme Court analyzed Section 1231(a) of Title 8, which governs the detention period after an entry of a final removal order. Pursuant to Section 1231(a)(2), normally upon a final order of removal, the alien ordered removed is held in custody during a subsequent 90-day removal period. See id., 533 U.S. at 682. Pursuant to Section 1231(a)(6), in the event the alien is not removed during the statutory 90-day period, the Government is authorized to detain the alien beyond that period. Specifically, Section 1231(a)(6) states, in relevant part:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. §1231(a)(6).

The U.S. Supreme Court determined that this "post-removal-period detention" statute contains "an implicit 'reasonable time' limitation, the application of which is subject to federal court review." Zadvydas, 533 U.S. at 682. Specifically, the court must assess "whether the detention in question exceeds a period reasonably necessary to secure removal." Id. at 699-700. If removal is not reasonably foreseeable, the detention is unreasonable. See id. If, after six months in custody, a detained alien can provide the court with "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." Id. at 701. Both cases of detention were thereby remanded to the district courts for assessment of the reasonable likelihood of the aliens' deportation at some point in the foreseeable future.

In the instant action, Marshall has been in INS custody since December 22, 2000. Thus, his detention has passed the six month period that has been determined by the U.S. Supreme Court to be the date triggering inquiry into the constitutionality of the detention. See Zadvydas,

533 U.S. at 701. Nevertheless, Marshall has failed to show evidence that removal in the foreseeable future is unlikely. Unlike the cases of Zadvydas and Ma, there are no political impediments, whether by way of treaty or lack of proof of citizenship, to the return of Marshall to his native home country. It appears the main reason for the current delay in removal was the appeal of the removal order as well as the instant habeas petition filed by Marshall. Marshall has pointed to no other obstacle that might bar his deportation following these proceedings. Because I find that it is likely that Marshall will be removed in the reasonably foreseeable future, I conclude that the detention is reasonable. As Marshall has been determined to be inadmissible under Section 1182 of Title 8, it is within the discretion of the Attorney General to keep Marshall in custody until that removal is effected.

2. February 22, 2001 Immigration Court Decision

Marshall also disputes the February 22, 2001 decision by the Immigration Court, which found that Marshall was still subject to removal for his violation of the INA. Marshall argues that the Immigration Court Order of November 27, 1981 had concluded that the vacating of his 1973 drug conviction cured any violation of the INA. Marshall ignores the fact that the November 27, 1981 decision noted that Marshall had violated two subsections of the INA. While his violation of former Subsection 1182(a)(23) of Title 8, which barred entry into the country after a drug conviction, may have been cured by the vacating of his 1973 drug conviction, Marshall's violation of former Subsection 1182(a)(17) of Title 8, which barred entry into the country without permission of the Attorney General, was not. As the Immigration Judge observed in his February 22, 2001 decision, Marshall was thus still subject to removal for this violation.

Similarly, Marshall disputes the determination in the February 22, 2001 decision by the Immigration Court that he was statutorily ineligible for the "extreme hardship to family" grounds for waiver of deportation. Petitioner argues that the loss of his file by the INS prevented the progression of his case to seek suspension of his deportation in 1981, and that the INS's decision

to execute the removal order now that he was no longer eligible for the "extreme hardship" waiver constitutes unfair and wrongful conduct. While the Court cannot commend the INS for its handling of Marshall's case, it does not merit petitioner's argument that the INS deliberately waited to commence proceedings until Marshall committed a drug trafficking offense that would render him ineligible for waiver of deportation. That Marshall pleaded guilty to a conspiracy of drug trafficking in 1997 would have by itself constituted subsequent grounds for removal from this country. The INS's inefficiency in administering the deportation proceedings in the instant action thus does not constitute affirmative misconduct. Under Subsection 1182(h)(1)(B), among the aliens convicted of violations of laws related to controlled substances, only those convicted of simple possession of 30 grams or less of marijuana are eligible for the "extreme hardship" waiver. See 8 U.S.C. § 1182(h)(1)(B). I thus find that the Immigration Judge correctly determined that Marshall was ineligible for the "extreme hardship" waiver.

3. Claim for Return of $20,000

With respect to the request for the return of the $20,000 allegedly confiscated by the INS in 1981, the request will be dismissed with prejudice. This claim is simply not cognizable in a federal habeas corpus proceeding. See, e.g., Balliviero v. White, 895 F.2d 1412 (6th Cir. 1990) (claim for tort is civil action distinct from habeas suit). Such claims should normally be brought in an action pursuant to the Federal Tort Claims Act, which provides the exclusive remedy for a tort claim against the federal government; nevertheless, the instant claim, filed more than 20 years after the alleged incident, has far exceeded the requisite statute of limitations. See 28 U.S.C. § 2401(b) (barring tort claim unless presented in writing to appropriate federal agency within two years after accrual of claim). Moreover, as shown in the papers submitted to the Court, there appears to be no evidence supporting Marshall's claim that the $20,000 in his possession at the time of his apprehension in 1981 was actually confiscated. (Decl. of Kent Frederick with attachments.) Accordingly, the Court sees no avenue for relief for Marshall in this matter.

4. Motion for Stay of Deportation

Because the Court will deny Marshall's petition for writ of habeas corpus as meritless, there is no need to stay the deportation proceedings. Accordingly, the motion will be denied.

D. Conclusion

For the reasons stated above, the Court will deny the instant petition for writ of habeas corpus and motion to stay deportation. Petitioner has raised no factual issue that requires a hearing to resolve. An appropriate Order follows.

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O R D E R

AND NOW, this 29th day of April, 2002, upon consideration of the petition for writ of habeas corpus (Doc. Nos. 1, 5), the response thereto, the reply thereto, the supplemental response thereto, the motion of petitioner to stay deportation (Doc. No. 3), and all accompanying documents filed, and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the petition for a writ of habeas corpus is **DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING**.

It is **FURTHER ORDERED** that petitioner's motion to stay deportation is **DENIED**.

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LOWELL A. REED, JR., S.J.